COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP1879-CR **Cir. Ct. No. 2015CF341**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSHUA J. LUTHER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Affirmed and cause remanded for further proceedings.*[1]

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

[1] This court previously entered an order that stated that "the trial in this matter shall be stayed until further order of this court." That stay is now lifted as of the date of this opinion.

¶1 LUNDSTEN, P.J. Joshua Luther was charged under WIS. STAT. § 940.25(1)(am) with causing injury by operating a vehicle with a detectable amount of a restricted controlled substance in his blood.[2] At issue here is the admissibility of evidence that Luther asserts supports an affirmative defense found in § 940.25(2)(a). In general terms, the defense requires a defendant to prove that the injury would have happened "even if" the defendant had exercised "due care" and there was no controlled substance in the defendant's blood. ***Id.*** We refer to this defense throughout as the "even-if defense."

¶2 Luther planned to rely on the even-if defense and, in support, present expert testimony indicating that the low level of the controlled substance in his blood would not have caused impairment. The circuit court granted the State's pretrial motion to exclude this evidence.

¶3 We granted Luther's request for leave to appeal the resulting order. *See* WIS. STAT. RULE 809.50(3). As explained below, given the information in the record at the time the circuit court ruled, the pretrial ruling was proper, and we affirm.

¶4 However, at the same time we caution that the circuit court may need to revisit the topic depending on further developments. The circuit court's ruling, in keeping with arguments made by the State before that court, appears to be based on the court's conclusion that evidence of lack of impairment is never admissible to support the even-if defense. We question this conclusion.

[2] All references to the Wisconsin Statutes are to the 2015-16 version. We cite the current version for ease of reference. The statutory language that we apply here has not changed during the times relevant to Luther's prosecution.

Accordingly, we affirm the circuit court's pretrial ruling with the caveat that there may, or may not, be cause to revisit that ruling as this case proceeds.

Background

¶5 In the early afternoon of May 1, 2015, on a "clear" day, Luther was driving a "work van." Luther, who had been heading east on a county highway, was stopped at a stop sign where the county highway intersects a U.S. highway.

¶6 Luther "pulled out" from the stop sign and struck a motorcyclist who had been traveling south on the U.S. highway. After the crash, Luther told a police officer that, when he "pulled out," he did not see the motorcycle. The motorcyclist was severely injured, including a leg severed below the knee. There is no dispute that cross-traffic in front of Luther on the U.S. highway was uncontrolled by a sign or light and, therefore, the motorcyclist had the right of way.

¶7 A witness told police that he saw the motorcyclist "headed south on US Highway 151 in his right lane" and a "van ... sitting at the stop sign for [the county highway]." The witness said that "when the motorcycle got to the intersection the van pulled out and struck the motorcycle with the front corner of the van." The witness said the "motorcycle exploded and ended up in the median."

¶8 After the collision, a police officer told Luther that police would request a blood test. Luther told the officer that he had not been drinking, but that

he had smoked marijuana the evening before. Subsequent blood testing revealed THC in Luther's blood.[3]

¶9 Prior to trial, the defense informed the State that it intended to call an expert witness who would opine that the level of THC in Luther's blood was "inconsistent with impairment." In the remainder of this opinion, we generally refer to this testimony as Luther's lack-of-impairment evidence.

¶10 The State moved to exclude the lack-of-impairment evidence, and the circuit court granted that motion. Notably, the circuit court appeared to hold that evidence of lack of impairment is never relevant to the even-if defense and, thus, regardless of Luther's particular evidence or future developments, Luther would not be permitted to present his lack-of-impairment evidence.

Discussion

¶11 Luther complains that the circuit court erred when it ruled that his lack-of-impairment evidence would be inadmissible at trial. In support of this basic contention, Luther makes several arguments. Those arguments fall into two groups: arguments based on the even-if defense and arguments advancing the proposition that Luther's lack-of-impairment evidence is admissible regardless whether the jury is instructed on the even-if defense. In section "A" below, we address the first group. In section "B," we decline to address the second group on the ground that those arguments are raised for the first time in Luther's reply brief.

[3] THC (tetrahydrocannabinols) is the active ingredient in marijuana. ***State v. Buchanan***, 2011 WI 49, ¶6, 334 Wis. 2d 379, 799 N.W.2d 775.

A. Luther's Arguments Based on the Even-If Defense

¶12 This section discusses the even-if defense and Luther's various arguments that, under this defense, he should be allowed to present his lack-of-impairment evidence, which to repeat would be expert testimony that the amount of THC in his blood was too slight to have any effect on his ability to drive with due care. Our discussion proceeds as follows:

First, we summarize the charged crime and the even-if defense.

Second, we explain that Luther's relevance argument assumes that he will be entitled to an even-if-defense jury instruction.

Third, we explain why the evidence known so far, including Luther's proffered lack-of-impairment evidence, is insufficient to warrant an even-if-defense instruction.

Fourth, we reject Luther's case-law-based argument that the even-if defense can be fully satisfied by proof that the defendant was not impaired by the restricted controlled substance.

Fifth, we comment on and question the circuit court's conclusion that lack-of-impairment evidence is never admissible in support of an even-if defense.

Sixth, we reject Luther's argument based on ***State v. Raczka***, 2018 WI App 3, 379 Wis. 2d 720, 906 N.W.2d 722 (2017).

Seventh, we reject Luther's reliance on the rule of lenity.

Eighth, we explain why, under the current circumstances, exclusion of Luther's lack-of-impairment evidence would not deny him his constitutional right to present a defense.

1. The Charged Crime and the Even-If Defense

¶13 Luther was charged with causing injury by intoxicated use of a vehicle. *See* WIS. STAT. § 940.25. The particular version of that crime at issue here has the following elements:

1) the defendant operated a vehicle;

2) the operation caused great bodily harm; and

3) the defendant had a detectable amount of a restricted controlled substance in his or her blood at the time of operation.

WIS. STAT. § 940.25(1)(am); *see also* WIS JI—CRIMINAL 1266 (2011). Because the third element requires proof of a controlled substance in Luther's blood, at trial the State will be allowed to present evidence that Luther's blood contained THC. The State, however, will not need to prove that the THC caused Luther to be impaired. Impairment is not an issue under these elements.

¶14 Apart from Luther's arguments that we discuss in section "B," all of his arguments are based on the proposition that his lack-of-impairment evidence will assist him in proving a statutory affirmative defense to this crime, that is, the even-if defense. As stated above, this defense, found in WIS. STAT. § 940.25(2)(a), provides, in pertinent part: "The defendant has a defense if he or she proves by a preponderance of the evidence that the great bodily harm would have occurred even if he or she had been exercising due care and he or she ... did not have a detectable amount of a restricted controlled substance in his or her blood ...."

¶15 We note that the offense of injury by intoxicated use of a vehicle and the even-if defense, at issue here and found in WIS. STAT. § 940.25, track the

homicide by intoxicated use crime and even-if defense found in WIS. STAT. § 940.09, except for the causing injury versus the causing death elements in the respective versions. This is significant because most of the case law discussed in this opinion addresses the homicide versions of the crime and the defense. Those cases are directly applicable because the statutory schemes in both the injury crime and the homicide crime are the same on the issues that matter here.

¶16 Further, we observe that some case law explaining the even-if defense uses "intervening cause" language. We do not. Following the supreme court's guidance in ***State v. Lohmeier***, 205 Wis. 2d 183, 194-95, 556 N.W.2d 90 (1996), we, in the words of ***Lohmeier***, "focus[] on the language of the statute itself, which makes no reference to an intervening cause." ***Id.*** at 194.

¶17 Summing up the even-if defense, as applicable here, Luther must prove both that:

1) the injury would have occurred even if Luther had been exercising due care, and

2) the injury would have occurred even if Luther did not have a detectable amount of THC in his blood.

Our focus is on the first prong—the due care requirement.

2. Luther's Relevance Argument Assumes that He Will Be Entitled to an Even-If-Defense Jury Instruction

¶18 Pointing to the "exercising due care" part of the even-if defense, Luther argues that his lack-of-impairment evidence is relevant to proving that he acted with due care. Luther's apparent reasoning begins with the fact, explained above, that the jury will learn that he had THC in his blood. Luther contends that evidence showing that he was not impaired by the THC is relevant to the even-if

defense because it helps defeat an inference that jurors might draw from learning that he had THC in his blood, namely, that it is less likely that Luther acted with due care because he was impaired by the THC.

¶19 However, assuming without deciding that Luther's relevance argument is correct, it does not follow that Luther must be permitted to introduce his lack-of-impairment evidence. To state the obvious, a defendant is not entitled to present evidence to support an affirmative defense if that evidence, by itself, does not support instructing the jury on the defense and if there is no reason to think that the defendant is otherwise able to produce sufficient evidence to support the affirmative defense instruction.

¶20 Accordingly, we next turn our attention to whether, based on the record so far, and assuming that Luther's lack-of-impairment evidence is relevant to an even-if defense, there is any reason to think that Luther will be entitled to a jury instruction on the defense.

3. Whether the Evidence Known So Far Supports an Even-If-Defense Jury Instruction

¶21 An affirmative defense jury instruction is required only when "a reasonable construction of the evidence will support the defendant's theory viewed in the most favorable light it will reasonably admit from the standpoint of the accused." *See* ***State v. Stietz***, 2017 WI 58, ¶13, 375 Wis. 2d 572, 895 N.W.2d 796 (internal quotation marks and quoted sources omitted). Whether there is sufficient evidence to warrant giving an instruction is a question of law that appellate courts review de novo. *See* ***id.***, ¶14; ***State v. Mayhall***, 195 Wis. 2d 53, 57, 535 N.W.2d 473 (Ct. App. 1995).

¶22 Applying this standard, the problem for Luther is that, regardless whether Luther is permitted to prove lack of impairment, nothing known so far would support a jury finding that the injury to the motorcyclist "would have occurred even if [Luther] had been exercising due care."

¶23 All that is known is that, on a clear day in the early afternoon, Luther pulled away from his stopped position at a stop sign, proceeded into a crossing lane of traffic that had the right of way, and broadsided a motorcyclist who had been approaching from Luther's left. As the witness recounted, "when the motorcycle got to the intersection the van pulled out and struck the motorcycle with the front corner of the van."

¶24 The evidence above, even combined with Luther's lack-of-impairment evidence, is not enough to entitle Luther to an even-if-defense jury instruction. The lack-of-impairment evidence might help Luther show that he was *able* to exercise due care, but it does not supply a reason why the collision would have occurred even if Luther *had* exercised due care. It follows that there is no reason to think, at this pretrial stage, that Luther will be entitled to an instruction on the even-if defense and, thus, no reason why he would be entitled to present his lack-of-impairment evidence.[4]

[4] In his appellate briefing, Luther suggests that his own trial testimony will somehow further support the even-if defense, but he does not indicate what that testimony might be. In a defense brief before the circuit court, we see an introductory paragraph stating that Luther "looked both ways for oncoming traffic" before proceeding into the intersection. We do not view this statement as an offer of proof, and Luther does not argue on appeal that he informed the circuit court that he intended to testify that he looked both ways. Further, we question whether this addition to the expected trial testimony would make a difference. Even if a jury believed that Luther looked both ways before proceeding, that without more would not explain why a driver in his position, carefully scanning for oncoming traffic, would have proceeded into the intersection and collided with the motorcyclist. *Cf.* ***State v. Caibaiosai***, 122 Wis. 2d 587, 598-99, 363 N.W.2d 574 (1985) (evidence that, before the defendant lost control of his motorcycle, his (continued)

4. Luther's Case-Law-Based Argument that The Even-If Defense Can Be Fully Satisfied by Proof that the Defendant Was Not Impaired by the Restricted Controlled Substance

¶25 Although Luther argues that his lack-of-impairment evidence will assist him in proving that he acted with due care, he simultaneously advances an argument that effectively ignores the due care requirement. Luther spends considerable time arguing that his lack-of-impairment evidence is admissible because the even-if defense is satisfied by proof that shows nothing more than that the controlled substance in his blood did not contribute to him causing great bodily harm. According to Luther, the even-if defense asks only "whether the harm would have occurred regardless of the driver's impairment." Luther contends that this interpretation of the defense is supported by case law. It is not.

¶26 Luther points to a place in ***State v. Gardner***, 2006 WI App 92, 292 Wis. 2d 682, 715 N.W.2d 720, where we wrote that the even-if defense

> permits a defendant to show that the presence of the illegal drug was not the cause of the accident—that the injury would have occurred even if he or she had not used illegal drugs and driven.

Id., ¶23. Viewed in isolation, this summary of the even-if defense might be read as supporting Luther's argument. However, in the portion of ***Gardner*** that Luther relies on, we were not concerned with the details of the even-if defense. Rather, our sole focus was on the propriety of placing the *burden* on a defendant to prove the defense. *See* ***id.***, ¶¶22-24. Elsewhere in ***Gardner*** we provided a more complete summary of the defense. *See* ***id.***, ¶11 ("Section 940.25(2)(a) creates an

---

passenger could have affected control of the motorcycle, combined with testimony that the motorcycle "had gone 'towards the gravel' and a cloud of dust was raised," was too speculative to warrant an even-if-defense instruction).

affirmative defense that will absolve the defendant of all liability if he or she can prove by a preponderance of the evidence that great bodily harm would have occurred even if he or she had been exercising due care and had not had a detectable amount of a controlled substance in his or her blood.").

¶27 Luther's reliance on ***State v. Turk***, 154 Wis. 2d 294, 453 N.W.2d 163 (Ct. App. 1990), is similarly misplaced. In ***Turk***, we quoted the circuit court's statement that the even-if defense question is: "'Would the injury still have happened anyway?'" ***Id.*** at 295. But, once again, we were not suggesting that this language was a complete summary of the even-if defense. Rather, at that point in ***Turk*** we were rejecting Turk's argument that the circuit court misunderstood that the *event* that a defendant must prove would have occurred "even if" is not an "accident," but rather an "injury." *See* ***id.*** at 295-96.

¶28 The only other case Luther points to worth discussing is ***State v. Caibaiosai***, 122 Wis. 2d 587, 363 N.W.2d 574 (1985). Luther states that his reading of other cases is consistent with the supreme court's 1985 ***Caibaiosai*** decision because that decision says, in Luther's words, "that the due care defense asks whether the harm would have occurred regardless of the driver's impairment." However, Luther misreads ***Caibaiosai***. As the State explains, ***Caibaiosai*** makes clear that a defendant must do more than offer evidence showing that the injury (in that case death) would have occurred regardless of intoxication. Referring to this formulation of the defense, the ***Caibaiosai*** court stated: "This is not a correct application of the affirmative defense. If it were, the defendant could exonerate himself by claiming he was negligent and thereby avoid the consequences of having caused the death while operating a motor vehicle while intoxicated." ***Id.*** at 600. Indeed, after ***Caibaiosai***, the legislature amended

the defense to reflect the ***Caibaiosai*** court's holding that more is needed. *See* ***Raczka***, 379 Wis. 2d 720, ¶11.

¶29 If the even-if defense were as simple as Luther asserts—that a defendant need only prove that the injury would have occurred regardless whether the defendant was impaired—then it might follow that Luther would have the right to an instruction on the defense and to present his lack-of-impairment evidence. But the defense is not that simple. At a minimum, and as we explained in subsection 3 above, proof of lack of impairment, by itself, does not provide proof that the injury "would have occurred even if [the defendant] had been exercising due care."

5. Whether Lack-Of-Impairment Evidence Is Never Admissible to Assist a Defendant in Proving the Even-If Defense

¶30 The circuit court did not rule that Luther will not be entitled to an even-if-defense jury instruction. Neither party asked the circuit court to address the topic. But the circuit court did rule that lack-of-impairment evidence is never admissible to assist a defendant in proving the even-if defense. The circuit court stated: "It doesn't seem to me that this [even-if] defense ... was ever intended to be used to deal with the level of impairment." The court also said: "I am specifically ruling that ... you cannot attack the level of impairment under the guise of this defense." The parties here dispute whether the circuit court was correct on this topic.

¶31 Although we resolve this case based on our conclusion that the record so far does not entitle Luther to an even-if-defense jury instruction, we choose to comment on this relevancy dispute because it may matter on remand, depending on additional evidence that may emerge.

¶32 We begin with a discussion of what sort of evidence might warrant the affirmative defense instruction. We then discuss why Luther's lack-of-impairment evidence might be admissible if he is otherwise entitled to the instruction.

¶33 Although we see no indication in the record before us that more evidence on this topic will emerge that could help Luther, it is at least possible that there will be additional evidence warranting the instruction. For example, *if* there were evidence supporting a jury finding that the motorcyclist was traveling so fast that even a driver prudently looking both ways just before entering the intersection would similarly have struck the motorcyclist, *then* there might be a fact question for a jury as to whether the collision would have occurred even if Luther had been exercising due care and even if he did not have a detectable amount of THC in his blood.

¶34 Our speeding motorcyclist example above is analogous to a "dart-out" example in ***Lohmeier***. The ***Lohmeier*** majority explained that "[t]he 'dart-out' fact pattern is an illustrative example of when the [even-if] defense could be established through the victim's conduct." ***Lohmeier***, 205 Wis. 2d at 195 n.9. ***Lohmeier***'s "dart-out" example appears to be a reference to a hypothetical in the dissenting opinion in ***Caibaiosai***, 122 Wis. 2d 587. The ***Caibaiosai*** dissent maintains that the ***Caibaiosai*** majority's interpretation of the statutes permits a homicide-by-intoxicated-use conviction even if "[a] driver under the influence of an intoxicant kills a child who darts into the path of the car ... from between parked cars." ***Id.*** at 603 (Abrahamson, J., dissenting). Thus, we understand ***Lohmeier*** to be explaining that an "intoxicated" operator of a vehicle, defined in both WIS. STAT. § 940.09 and WIS. STAT. § 940.25 to include an operator with a "detectable amount of a restricted controlled substance in his or her blood," is

entitled to an even-if-defense instruction if there is evidence that the death or injury was caused by the act of a victim, rather than the operator. We note that the same might be true if a different factor, apart from the defendant, caused the death or injury, such as a passenger in the defendant's car reaching over and yanking the steering wheel, causing the car to collide with a victim.

¶35 Luther's argument here, to repeat, is that his lack-of-impairment evidence is relevant to the even-if defense because his jury will learn that Luther had THC in his blood and might infer that it is less likely that he acted with due care because he was impaired by the THC. The State responds with the assertion that "[w]hether the defendant was impaired by the controlled substance is not relevant to this affirmative defense," but we find no place where the State explains the flaw in Luther's reasoning. If there is a flaw, it is not apparent to us.

¶36 A hypothetical presented by the State provides a good example of when an even-if-defense instruction would be called for *and* when lack-of-impairment evidence would at least arguably be admissible. The State writes:

> Imagine that Luther had THC in his system while he drove his van down the highway at a legal speed, and was passing through the intersection with the right of way, when a motorcyclist that had stopped at a stop sign pulled out and drove directly into the van, and the motorcyclist suffered great bodily harm. Luther would have an affirmative defense to a charge of causing great bodily harm while operating with a restricted controlled substance, because he was driving with due care, albeit with THC in his system, and he could not have avoided the crash.

Faced with these hypothetical facts, it is not apparent to us why Luther could not present evidence that the amount of the controlled substance in his system was so slight that it would not have affected his ability to act with due care. That is, in the State's hypothetical, jurors might still reasonably wonder whether Luther would

have swerved to avoid the motorcyclist—thus avoiding the injury—if only he had not had a controlled substance in his system.

¶37 We stress that this relevancy question is not necessary to the resolution of this appeal and we do not decide the question. But if this question arises in the future, the circuit court should revisit its assumption that lack-of-impairment evidence is never relevant to the even-if defense.

6. Luther's Argument Based on ***State v. Raczka***

¶38 In his reply brief, Luther relies on our recent ***Raczka*** decision to make a new argument based on the even-if defense. Although this argument is raised for the first time in reply, we choose to address it because ***Raczka*** was issued after Luther and the State filed their initial appellate briefs.

¶39 Looking to ***Raczka***, Luther seems to argue that the circuit court here improperly decided as a matter of law that Luther failed to exercise due care. Luther describes ***Raczka*** and then asserts that the circuit court here effectively decided as a matter of law that Luther failed to exercise due care, a ruling prohibited by ***Raczka***.[5]

[5] Luther's reply brief asserts that, in ***State v. Raczka***, 2018 WI App 3, 379 Wis. 2d 720, 906 N.W.2d 722 (2017), we, in Luther's words, "observed that whether Raczka was *negligent* is a question of fact that cannot be presumed as a matter of law" (emphasis added). What we actually held was that "whether Raczka's failure to take his medication was *a failure to exercise due care* is a question of fact; it cannot be presumed as a matter of law." ***Id.***, ¶15 (emphasis added). At the same time, we acknowledge that in ***Raczka*** we effectively treated as the same inquiry (1) whether Raczka was negligent and (2) whether Raczka failed to exercise due care. *See* ***id.***, ¶14. Accordingly, we treat Luther's assertion that, "[a]s in ***Raczka***, this Court cannot conclude that Mr. Luther was negligent as a matter of law" to mean that Luther is contending that, "as in ***Raczka***, this Court cannot conclude that Mr. Luther failed to exercise due care as a matter of law ...."

¶40 Luther's comparison with the circuit court error in ***Raczka*** is inapt. It is true that ***Raczka*** involved the comparable homicide version of the charged crime, the equivalent even-if defense, and a circuit court's pretrial ruling excluding evidence supporting the even-if defense. But the similarity essentially stops there. As we describe below, in ***Raczka*** the defendant was prepared to present substantial evidence that he acted with due care. Here, Luther has not so far indicated that he will be able to point to any evidence that he acted with due care.

¶41 Raczka drove his car off a road and crashed into a tree, killing his passenger. ***Raczka***, 379 Wis. 2d 720, ¶2. A test revealed that Raczka had "traces of marijuana and cocaine" in his blood. ***Id.*** Pertinent here, Raczka was charged with causing the death of another by the operation of vehicle while having a detectable amount of a restricted controlled substance in his blood. *See* ***id.***, ¶¶2, 8. Raczka sought to raise the even-if defense with substantial supporting evidence tending to show that the collision with the tree was caused by Raczka suffering a seizure, not because of any lack of due care and not because of the trace amounts of controlled substances in his blood. ***Id.***, ¶¶3-4. The State, pointing to expected evidence showing that Raczka had a history of seizures and that he failed to take available anti-seizure medication, moved the circuit court to exclude "all evidence" relating to the even-if defense. *See* ***id.***, ¶¶1, 5. In the State's view, Raczka was negligent in failing to take his medication. ***Id.***, ¶5. The circuit court agreed with the State, concluding "that any evidence that Raczka had a seizure was inadmissible because Raczka's failure to take his medication was negligent as a matter of law and a total bar to [an even-if defense]." ***Id.***, ¶6.

¶42 In our ***Raczka*** decision, we agreed with the circuit court that, "if failing to take the [seizure] medication was negligent and this negligence caused

the seizure and the crash, then the [even-if] statute offers no defense." ***Id.***, ¶14. We reversed, however, based on the evidence in that case. *See* ***id.***, ¶19. We summarized the substantial evidence that Raczka crashed because of a seizure and evidence showing that Raczka might have prevented the seizure by taking a medication. *See* ***id.***, ¶¶12, 14-15. We then concluded, based on the expected evidence, that a jury could find that "Raczka had been exercising due care under the circumstances and that he did have a seizure leading to the accident," or, "[o]n the other hand," find "that Raczka did not meet his burden to prove that he had a seizure, or that even if he did, he [did not prove he] was exercising due care [because] he failed to take his medication." ***Id.***, ¶15. In case-specific language, we concluded: "[W]hether Raczka's failure to take his medication was a failure to exercise due care is a question of fact; it cannot be presumed as a matter of law." ***Id.***

¶43 Nothing in ***Raczka*** suggests that, every time a defendant offers to prove part of the even-if defense, that defendant is entitled to an even-if-defense jury instruction and entitled to present the proffered evidence. More to the point, unlike the evidence in ***Raczka***, Luther's proffered evidence so far, even if believed by a jury, does not support giving the even-if-defense jury instruction.

7. Luther's Reliance on the Rule of Lenity

¶44 Luther asks us to apply the rule of lenity. "The rule of lenity provides that when doubt exists as to the meaning of a criminal statute, 'a court should apply the rule of lenity and interpret the statute in favor of the accused.'" ***State v. Guarnero***, 2015 WI 72, ¶26, 363 Wis. 2d 857, 867 N.W.2d 400 (quoted source omitted). That is, ambiguity in a penal statute should, generally, be resolved in favor of the defendant. ***State v. Cole***, 2003 WI 59, ¶67, 262 Wis. 2d

167, 663 N.W.2d 700. A statute is ambiguous when it is susceptible to more than one reasonable interpretation. ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶47, 271 Wis. 2d 633, 681 N.W.2d 110.

¶45 Luther contends that the even-if defense statute here is ambiguous because "[a] defendant could reasonably conclude from reading the statute that it permits him or her to use whatever evidence is available to show that the accident would have happened regardless of the presence of drugs or alcohol." This argument is a twist on an argument that we have already rejected.

¶46 Above, we rejected Luther's argument that we *must* read the even-if defense statute as merely requiring proof that a defendant was not impaired by the restricted controlled substance. Here, Luther is arguing that there is ambiguity because the even-if defense statute *may* be reasonably read as only requiring proof that an injury would have happened, regardless of impairment. Both arguments suffer the same fatal defect—they ignore the due care requirement. That is, Luther's asserted alternative reading of the statute is not reasonable because, at a minimum, it does not account for the due care requirement.

8. Luther's Constitutional Right to Present a Defense

¶47 Luther argues that the circuit court's ruling prohibiting his proffered lack-of-impairment evidence violates his constitutional right to present a defense. However, as the parties agree, showing a violation of that right requires that a defendant show that the evidence was necessary to a theory of defense. *See* ***State v. St. George***, 2002 WI 50, ¶54, 252 Wis. 2d 499, 643 N.W.2d 777. And, as our discussion above demonstrates, in view of the record so far, Luther will not be entitled to an even-if-defense jury instruction. It follows that, unless there is a new

development, the exclusion of Luther's lack-of-impairment evidence will not deny him necessary evidence.

B. Luther's Arguments for the Admissibility of the Lack-of-Impairment Evidence that Do Not Rely on an Even-If-Defense Jury Instruction

¶48 In addition to his reliance on ***Raczka***, Luther makes two other arguments for the first time in his reply brief. We acknowledge that Luther hints at the first of these arguments in a footnote in the factual background section of his brief-in-chief, but we do not consider this brief reference in a non-argument-section footnote to be sufficient to avoid our conclusion that the argument is raised for the first time in Luther's reply brief.

¶49 First, Luther argues that, regardless of the even-if defense, evidence of lack of impairment will be relevant and admissible if he chooses to testify at trial about the collision because a jury would be more likely to find him credible if the jury learns Luther's senses were not impaired at the time of the collision. Second, Luther contends that lack-of-impairment evidence is relevant to whether he had a detectable amount of a controlled substance in his blood.

¶50 Perhaps Luther can raise these arguments before the circuit court on remand, but we decline to address them on appeal because they are raised for the first time in a reply brief. *See* ***State v. Mechtel***, 176 Wis. 2d 87, 100, 499 N.W.2d 662 (1993) ("We do not generally address arguments raised for the first time in reply briefs.").

Conclusion

¶51 For the reasons above, we affirm the pretrial ruling of the circuit court. At the same time, we explain above that the ruling may need to be revisited, depending on further developments.

By the Court.—Order affirmed and cause remanded for further proceedings.

Not recommended for publication in the official reports.